

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

BROWN AUTOMATIC SPRINKLERS, INC.¹

Employer

and

Case 12-RC-9062

UNITED ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE PLUMBING,
PIPEFITTING, SPRINKLER FITTING
INDUSTRY OF THE UNITED STATES AND
CANADA, LOCAL 821, AFL-CIO²

Petitioner

REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION

Brown Automatic Sprinklers, Inc. (the Employer), installs fire sprinkler systems in commercial buildings throughout the State of Florida and part of the State of Georgia. It maintains offices in Tampa, Florida and Valdosta, Georgia, along with a storage facility in Orlando, Florida. The Petitioner filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act, and thereafter amended it, seeking to represent a unit including all full-time and regular part-time journeymen sprinkler fitters, apprentices, helpers, lead fitters and foremen employed by the Employer out of its Tampa, Ocala, and Orlando, Florida and Valdosta, Georgia facilities, excluding office clerical employees, designers, estimators, guards and supervisors as defined in the Act. A hearing officer of the Board held a hearing and the parties filed briefs with me.

The parties agree that the petitioned-for unit, as amended at the hearing, is an appropriate unit, except that the parties disagree about whether or not all of the foremen are supervisors within the meaning of Section 2(11) of the Act.

¹ The Employer's name appears as amended at hearing.

² The Petitioner's name appears as amended at hearing.

The Employer employs 14 individuals whom it contends it classifies as foremen—Howard Absher, Christopher Bass, Wayne Chambers, Richard Gobbels, William Griffin, Jeremy Luteran, Ivars Macias, Bradford Mosley, William Nettles, Shannon Stevens, Danny Weller, Stephen Williams, David Wood and Fred Cook. During the hearing, the parties stipulated that David Wood, Shannon Stevens, William Nettles, Fred Cook and Richard Gobbels are supervisors within the meaning of Section 2(11) of the Act. Thus, the only issue raised by the parties is whether the remaining nine individuals are supervisors within the meaning of Section 2(11) of the Act. The record reveals an additional issue—if foremen are supervisors within the meaning of Section 2(11) of the Act, is that status maintained during periods when the individuals in issue are working on projects without employees to supervise?

The Petitioner contends that the nine foremen at issue are not supervisors and should be included in the unit. Specifically, the Petitioner asserts that the Employer has two types of foremen; those who further management prerogatives and exercise independent judgment and those who do not. The Petitioner argues that, despite the shared title and job description in the Employer's handbook,³ most of the foremen do not possess the actual authority required by the Act to be found to be supervisors.

The Employer, on the other hand, argues that the foremen are supervisors within the meaning of Section 2(11) of the Act. The Employer asserts that the foremen are typically the Employer's only representatives at each project and as such each foreman has the overall responsibility for his project. The Employer contends that all foremen have the authority to hire, fire, and discipline employees as well as to assign work and transfer employees. The Employer takes the position that even the foremen who do not currently have crews working under them are still supervisors under Section 2(11) of the

³ As discussed in more detail below, the Employer has created, or had created for it, a Foreman's Handbook which was issued to all of its foremen.

Act since the Employer intends to assign crews to those foremen when they begin work on projects that require additional manpower.

I have considered the evidence and arguments presented by the parties regarding the question at issue here and, as discussed below, I have concluded that the foremen in question who are working on projects and who have crews reporting to them are supervisors within the meaning of Section 2(11) of the Act and must be excluded from the petitioned-for unit. Thus, I am directing an election in a unit of approximately 28 employees.

I. OVERVIEW.

As noted above, the Employer has an office and place of business in Tampa, Florida, where it is engaged in the business of the installation of fire sprinkler systems, and also has an office in Valdosta, Georgia and a storage facility in Orlando, Florida. The Employer employs approximately 14 foremen, 13 fitters, and 15 helpers. On occasion, the Employer has used labor pools if additional employees are needed on a particular project. The Employer installs new and retrofit sprinkler systems almost exclusively and it is trying to get away from the little service work that it does perform.

The Employer is a subcontractor and bids on commercial jobs. CEO Mathew Brown, Sr. prepares the estimates with occasional help from one of the Employer's two designers. As the title implies, the designers design the installation plan if necessary, but it appears that many contractors have plans already drawn, or at least partially prepared, at the time bids are submitted. Henry Leon is the Employer's president and also holds the position of superintendent and all of the foremen report to him. Until recently, foreman William Nettles also held the position and title of superintendent.

In Valdosta, Georgia, the Employer employs, a branch manager, a foreman named Fred Cook, and a crew of sprinkler fitters and helpers. Foremen Shannon Stevens, Ivar Macias, and William Griffin work in the Orlando, Florida area. Foremen

David Woods and Danny Weller work in and around Ocala, Florida. Foreman Richard Gobbels has worked on projects from Venice, Florida to Gainesville, Florida. Foreman Brad Mosley is working in Tampa, Florida at the Tampa International Airport and foreman Chris Bass is working at Mease Hospital in the Clearwater, Florida area. Jeremy Luteran is working at the Largo Library in Largo, Florida. It is not clear from the record where the remaining foremen are working.

The foremen are paid on an hourly basis and can earn incentive bonuses for completing projects early. However, there is no evidence in the record that any foreman has actually earned such a bonus. Some of the foremen are provided with company vehicles. Those who are not given vehicles are paid a monthly stipend for the use of their personal vehicles for work purposes. It appears that all foremen have company credit cards that they can use to purchase fuel for their vehicles. All of the foremen are provided with Nextel radios and some have also been given cell phones. None of the helpers or fitters are given company vehicles, are paid for using their own vehicles, have fuel cards, or have Nextel radios or cell phones.

There is some evidence that the insurance benefits provided to the foremen are different than the benefits provided to the fitters and helpers, however, all of the foremen receive the same insurance benefits. The record provides no explanation as to how the insurance benefits differ between the foremen and the fitters and helpers. It also appears from the record that the lowest paid foreman earns more per hour than the highest paid fitter. However, no payroll records were introduced and there is no evidence in the record indicating how much more the lowest paid foreman earns than does the highest paid fitter.

Each foreman typically has a crew working on the job with him. Crew sizes range from one employee to four or more employees and can consist of fitters or helpers, or both, and each morning the employees report directly to the jobsite where

they have been assigned to work. Foremen can be assigned to one or more jobs at any given time and the projects can last anywhere from a few days to 18 months, with an average length of four months. On occasion, foremen work on jobs without a crew and are sometimes assigned to work on jobs under other foremen.

II. DUTIES OF THE FOREMEN.

Section 2(11) of the Act defines the term supervisor as “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” To meet this definition, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. Ohio Power Co. v. NLRB, 176 F.2d 385 (6th Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. Harborside Healthcare, Inc., 330 NLRB 1334 (2000). Of course, in order to be a supervisor within the meaning of Section 2(11) of the Act, the individual in question must have employees to supervise, as the statutory definition set forth above demonstrates. The burden of proving supervisory status lies with the party asserting that such status exists. Kentucky River Community Care, Inc., 532 U.S. 706, 711-712 (2001). Thus, as I discuss the duties performed by the foremen, I will pay particular attention to the criteria specified in Section 2(11) of the Act.

As discussed above, the parties stipulated that five foremen are supervisors within the meaning of the Act, leaving the status of nine foremen unresolved. In the following sections of this Decision, I will discuss the general duties of the foremen. I will then describe the duties performed by the foremen who are stipulated to be supervisors within the meaning of Section 2(11) of the Act. Next, I discuss the duties performed by

foreman Chris Bass.⁴ Then I will set forth the duties performed by the eight remaining foremen on whose status the parties disagree. In Section III of this Decision, I will explain my analysis of the facts and the basis for my conclusion that all of the Employer's foremen are supervisors within the meaning of Section 2(11) of the Act.

A. Overview of the Foremen's Duties.

The Employer's superintendent assigns the foremen to their projects. Once a foreman is assigned a project, that foreman becomes responsible for its completion. The superintendent meets with the foreman at the time the project is assigned. During the meeting, the superintendent reviews the plans for the job with the foreman and gives the foreman a budget. The foreman then lays out a schedule for completing the project within budget.

Before beginning the job, the foreman assigned to a particular project also meets with the general contractor. The foreman and the general contractor discuss where the work will begin and when the contractor expects that work to be completed. During the project, the foreman attends scheduling meetings with the general contractor and subcontractor. The foreman also discusses problems, such as falling behind schedule, with the general contractor. The superintendent visits each jobsite slightly more than once a month and the foreman acts as the Employer's primary contact on the jobsite.

The plans given to the foreman at the start of a project show generally where the pipe and sprinklers are to be installed. Based on those plans, the foreman must make sure that all of the needed material and supplies are at the jobsite. Also, using those plans, the foreman assigns his crew members to work on specific tasks.⁵ Most of the foremen spend 90% to 95% of their time working alongside their crew.

⁴ Foreman Chris Bass is addressed separately from the other eight disputed foremen because he testified at the hearing.

⁵ The assignment of work by the foremen will be discussed in greater detail below.

Foremen can transfer their crew members between projects if they have multiple ongoing jobs. Foremen can also lend crew members to other foremen at the request of the superintendent or other foremen, however, no foreman is required to assign his crew members to another foreman's crew or to accept the particular crew member that is offered.

It appears that all foremen have been given a copy of the foreman's Manual, which indicates that it was revised several times during 2002. The manual contains a number of forms in it, including applications for employment, job performance evaluations, and personnel action forms. It also contains a copy of the Employer's Employee Handbook. The foremen have also been given a copy of the foreman's job description.

B. The Stipulated Supervisors.

At the opening of the hearing, the parties stipulated that Shannon Stevens, David Wood and William Nettles possess and exercise the authority to engage in one or more of the following: hire, transfer, suspend, layoff, recall, discharge, assign, reward or discipline employees or to responsibly direct employees or adjust their grievances or to effectively recommend such action using independent judgment and are therefore supervisors within the meaning of Section 2(11) of the Act. Following the testimony of Richard Gobbels, the parties stipulated that Gobbels is a supervisor within the meaning of Section 2(11) of the Act. The parties also stipulated that Fred Cook effectively recommends the hiring and discharge of employees and is thus a supervisor within the meaning of the Act.

David Wood has been a foreman for about 12 years and has at times been referred to as a superintendent.⁶ Wood has been responsible for as many as six jobs at any one time and his crew consists of four or more employees. Wood has hired and discharged employees. For example, Wood hired current foreman Danny Weller as a fitter for his crew. When Weller was initially hired, Wood decided how much Weller would be paid based on Weller's experience and his discussion with Weller. Wood has also discharged employees such as Weller's helper, James Able, whom he discharged after discussing Able with Weller. Currently, Wood has overall responsibility for Ocala Regional Medical Center and for training foreman Weller, but Weller is in charge of the day-to-day decisions on the project.

Foreman Shannon Stevens has been a foreman for five years and generally works in the Orlando area along with foremen Ivars Macias and William Griffin. Stevens, who is apparently considered to be in charge of the Orlando area⁷, testified that he has no authority over either Macias or Griffin. Stevens hired employee John Kirkland about 11 months prior to the date of the hearing. This is the only employee hired by Stevens. Currently, Stevens and his crew are working at Mease Hospital and foreman Bass assigns him and his crew to particular work areas. Stevens has responsibility for the area to which Bass assigns him and he maintains authority over his crew, but has no authority over Bass or the project as a whole.

Richard Gobbels has been a foreman for about eight and a half years and has worked from Venice, Florida to Gainesville, Florida. Gobbels has a five-man crew. At

⁶ It is not clear from the record who refers to Wood as a superintendent, however, he testified that he sometimes covers "that area" when he goes to meetings. He also testified that he is generally considered to be in charge of the Ocala area, but the record contains no explanation of what being in charge of the Ocala area entails.

⁷ Wood testified that Stevens is considered to be in charge of the Orlando area, but the record contains no explanation of what being considered to be in charge means, or who considers Stevens to be in charge of the Orlando area. As stated above, Stevens testified that he has no authority over the other foremen working in the Orlando area.

the start of the job, Gobbels meets with the contractor to find out when he can start. He also ensures that materials will be onsite when needed and he decides how many employees he will need for the job. Gobbels determines the size of his crew by considering the size and pace of the job and comes to a conclusion about how many employees will be necessary to finish the job on time. Gobbels then makes the work schedule for jobs. Gobbels cannot assign employees overtime without first discussing it with the superintendent, but he has never made a recommendation regarding overtime that was rejected. Once Gobbels has the okay to assign overtime, he selects which crew members will work the overtime. Gobbels has the responsibility for making sure that the projects to which he is assigned are completed on time.

Gobbels has hired multiple employees, including an individual named Kelly Stevens, his neighbor's son, and individuals who responded to a newspaper advertisement seeking help. Gobbels hired these individuals without seeking permission from anyone and testified that he set the newly hired employees' wage rates based on his experience. Gobbels has hired employees at rates ranging from \$7.00 an hour to \$11.00 an hour. It appears that the superintendent reviews the wage rates set by Gobbels and the other foremen, but that the superintendent has never failed to approve the rate set by a foreman. Gobbels has also completed employee evaluations, including evaluations of employees Conales, Pereira, and Gonzalez, and has given them raises. Again, it appears that the superintendent reviews and approves the wage increases recommended by Gobbels, but has never rejected a proposed increase.⁸

C. Foreman Bass.

Foreman Chris Bass has been a foreman for about two years. Bass is paid for the use of his personal vehicle for work purposes and carries a Nextel radio. Bass is

⁸ The record does not address whether or not the superintendent has ever granted a higher increase than the one recommended by the foreman.

currently assigned to the Mease Hospital project and has one fitter and two helpers on his crew. At the time of the hearing, Bass had three day laborers working on the project. Foreman Shannon Stevens is currently assigned to the project, but as mentioned above, Bass retains responsibility for the overall job. Thus, while Bass does not tell Stevens how to get the work done, Bass does decide where he needs Stevens to work and instructs Stevens to work in that area. Bass is ultimately responsible for installing the system and making sure that the appropriate individuals resolve all discrepancies. Minor discrepancies, such as the pipe being incorrectly fabricated or not being sent to the jobsite, are resolved by Bass.⁹

When he is initially assigned to a project, Bass is given a set of plans. The plans describe where the piping is to be routed and give the basic dimensions of the job. Then Bass usually meets with the general contractor who tells him when and where to start the project. After the project begins, Bass attends scheduling meetings with the general contractor and other subcontractors. Neither the fitters nor the helpers ever speak with the contractor regarding the project. Bass also discusses with the general contractor the status of the project, such as whether his crew is behind or ahead of schedule. If Bass' crew gets too far behind schedule, the superintendent will get involved.¹⁰ In the past, the superintendent visited each jobsite about once a month. Since Leon has taken over the superintendent duties the visits occur a little more frequently. Bass spends about 95% of his time working alongside his crew.

Bass decides how many employees are needed for a particular task on a particular job and he assigns employees to perform these tasks.¹¹ He is responsible for instructing his crew on what to do when he is not at the jobsite. So, for example, prior to

⁹ It is not clear from the record what constitutes a "major" discrepancy.

¹⁰ The record contains no evidence specifying exactly when a project would be so far behind schedule so as to warrant the superintendent's involvement.

¹¹ There is no evidence in the record explaining how Bass determines the number of employees needed to complete a task or how he determines which employees to assign to a task.

appearing at the hearing, Bass held a meeting with his crew and told them what he expected them to do while he was gone. Bass also called one of his crew members during the hearing to make sure that all of the employees had shown up for work. Bass reviews the employees' work and gives employees instruction on how to correct deficiencies in their work. Bass also decides how he wants particular tasks to be performed and gives employees instructions in accordance with that decision.¹²

Bass has the authority to grant employees time off for emergency situations, illness, family issues, or important appointments. Bass can grant one or more days off at a time. However, Bass does not have the authority to grant employee requests for vacation time, which must be routed through the superintendent.

Bass attended a training session during August 2002 during which he was told that it was part of his job to find and hire employees.¹³ During the session Bass was given a new hire checklist, forms to order job applications, and was given training on how to manage employees. However, Bass has not hired any employees. Bass did recommend the hire of an individual as a foreman, but was told that the Employer was not seeking foremen at the time. Bass recommended that the Employer hire the fitter who is currently on his crew. However, the fitter worked with Bass for another employer and the two were interviewed and hired at the same time. Otherwise, Bass has not recommended the hiring of a fitter. He has, however, distributed applications and, based on the former superintendent's instructions, sent applicants to the office. Bass has also instructed individuals to go to take a drug test. Despite having been a foreman for approximately two years, Bass has not formally evaluated any employees.

¹² When asked to explain the difference between himself and his fitter, Bass explained that he makes decisions that he would rather his fitter ask about instead of making himself. Bass gave as an example a situation where some duct work was in the way of the pipe and the fitter might want to route the pipe around the duct, but Bass would have him move the whole line instead.

¹³ Bass testified that based on the August 2002 meeting and the Foreman's Manual that he understood that as a foreman he was expected to find and hire employees for his crew but, in practice, the superintendent has hired employees.

Bass has discharged employees after discussing the matter with the superintendent. In one situation, an employee consistently reported late to work and Bass called the superintendent, explained the situation and told the superintendent that the employee needed to be fired. Apparently, Bass was given permission to fire the employee, which he did.¹⁴ Bass was then instructed to complete a personnel action form explaining the discharge.

Bass also fired an employee who had been transferred to his crew from foreman Gobbel's crew when Bass requested additional employees for a project. Bass apparently did not care for the employee and spoke with Gobbels about him. Gobbels informed Bass that he had been told that he had to try to work with him more. So, Bass kept the employee around for two more days and then called the superintendent and explained the problem with the employee. The superintendent told Bass to go ahead and discharge the employee and Bass did so.

Bass has also discharged employees named Steven and Kyle. Bass has never recommended that an employee be discharged who was not then discharged. Bass has called the superintendent when he wanted to discipline an employee. He has never recommended discipline for an employee that he was not then permitted to administer.¹⁵

Bass calls the superintendent when he needs additional employees for a job. On occasion, Bass has been required by the superintendent to explain why he needed additional employees. Then, apparently, the superintendent instructed Bass to call other foremen to see if they could spare employees. So, for example, Bass was recently instructed to call foreman Gobbels to see if he had any employees he could spare. Gobbels told Bass that he had two employees who were finishing a job and he sent

¹⁴ It is not clear in the record exactly how the superintendent granted permission to discharge the employee. Bass testified that he discharged the employee with permission. Bass explained that he obtained permission to discharge the employee by calling the superintendent and explaining the situation to him. Bass went on to testify that he thought that the employee needed to be fired and that he was fired.

¹⁵ The record contains no examples of employee discipline issued by Bass.

them to work on Bass' project. Similarly, Bass has been asked by other foremen whether or not he has any employees that he can lend to them. Bass has lent his crew to other foremen and he has done so without obtaining permission from the superintendent.

On multiple occasions, Bass has requested that the superintendent provide him with additional employees to work on his project, but was not given any more employees. On those occasions, the superintendent instructed Bass to try to find his own help. Bass has been told by both the current and former superintendent that he needed to find his own employees.

Bass has also asked the superintendent to send him day laborers. The superintendent has sent however many employees he thought Bass needed. Bass has never made a request for day laborers that was denied. If Bass does not like one or more of the day laborers who have been sent to his job, he calls the superintendent and lets him know that he does not like those laborers. Those laborers are not returned to the job. Bass has recently been told by the superintendent that, as a foreman, if he thinks a day laborer is good, he should hire him or her.

D. The Remaining Foremen.

The foremen at issue who have not yet been addressed include Howard Absher, Wayne Chambers, William Griffin, Jeremy Luteran, Ivars Macias, Bradford Mosley, Danny Weller, and Stephen Williams. None of these eight individuals testified at the hearing.

Each of the eight foremen reports directly to the superintendent, with the exception of Danny Weller. It appears that all eight have the same authority as the foremen who are stipulated supervisors within the meaning of Section 2(11) of the Act

when in charge of a job.¹⁶ Each of the foremen is responsible for the manpower on his projects, managing the budgets, and training employees. Each one is responsible for maintaining contact with the customer, coordinating schedules with the general contractor and other subcontractors.¹⁷ If a foreman has multiple jobs, he is responsible for determining which of his crew members will work on which job. Most of the foremen's time is spent working alongside the crews.

The foremen are expected to find, interview, and hire employees.¹⁸ The foremen have the authority to discharge employees and do not have to seek approval from the superintendent prior to doing so. Foremen can transfer employees between their projects and between foremen, at their discretion. The foremen are also required to complete performance evaluations for their employees and recommend raises.¹⁹ There was testimony that wage no increase recommendation has ever been overturned.

All of the foremen can make use of day labor. If a foreman decides that day laborers are needed on a project, the foreman calls the superintendent. The foreman lets the superintendent know how many day laborers he wants and the superintendent places the order. The superintendent has apparently never rejected a request for day laborers.

Each of the foremen has either a Nextel radio or a Nextel radio and a cell phone. Each either drives a company vehicle or is paid for using their personal vehicle. They all interact with the general contractor and the other subcontractors on their jobsites. Each has been given a copy of the Foreman's Manual and each has the authority set forth in

¹⁶ This conclusion is based on CEO Brown's testimony that Nettles, Stevens and Wood do nothing different than the other foremen.

¹⁷ This conclusion is based on Brown's testimony.

¹⁸ There is no record evidence showing that any of these eight foremen, other than Ivars Macias or Jeremy Luteran, have actually hired any employees.

¹⁹ The record contains no examples of evaluations that were completed by any foreman other than Gobbels.

the foreman's job description.²⁰ One or more of the foremen attended the August 2002 training session and foremen who did not attend, with the exception of Jeremy Luteran, have apparently been given the same training at some point.

Danny Weller was recently promoted to foreman and is still in training. Foreman David Wood has overall responsibility for the project to which Weller is assigned. Wood gives Weller guidance in scheduling work and determining manpower needs. Weller is responsible for interacting with the customer, deciding in which areas to work, and making sure that he has all needed supplies. Wood has specifically told Weller that he has the authority to hire and discharge employees on his own.

Weller has disciplined at least one employee, albeit after consulting with Wood. In that instance, Weller discussed an employee's attendance issues with Wood, and Wood suggested that Weller could write up the employee or send him home for a day as discipline, but left the decision to Weller's discretion. Weller decided to issue the employee a verbal warning. Later, Wood and Weller decided to discharge the employee. Wood left the responsibility of discharging the employee with Weller; however, because Weller did not discharge the employee, Wood did it himself.

Currently, Ivars Macias is working on a project in Orlando.²¹ Foreman Griffin is working on the project with Macias, but Macias is apparently in charge of the project. Macias has hired an employee who started work at a rate of \$9.00 an hour.²² Macias also discharged an employee in January 2004 for absenteeism. Macias hired the employee and discharged the employee without seeking approval from the superintendent.

²⁰ This conclusion is based on the testimony of superintendent Leon.

²¹ It is not clear from the record whether or not Macias currently has a crew. At one point during the hearing, Shannon Stevens testified that Macias had a helper working on his project, but later appears to testify that Macias does not currently have a helper working with him.

²² The record is unclear about whether or not this employee quit or is still employed.

As mentioned above, Griffin is currently working in Orlando with Macias, apparently without a crew. However, the Employer expects to send Griffin to an upcoming project in Polk City. Griffin will be expected to hire his own crew for the project.

Foreman Brad Mosley is currently working at the Tampa Airport and has a crew of four employees and three day laborers reporting to him.

Foreman Jeremy Luteran is currently working at the Largo Library. Luteran's helper stopped reporting to work and Luteran is looking for a replacement. Luteran hired two Haitian-Creole employees, but, apparently because he does not speak Haitian-Creole, Luteran contacted another foreman who could communicate with them and transferred both to his crew. Luteran has since interviewed two employees and has informed the superintendent that he intends to hire them.²³

III. ANALYSIS AND CONCLUSIONS.

A. The Foremen Stipulated to be Supervisors.

Based on the record evidence and the parties' stipulations, I conclude that Shannon Stevens, David Wood, Richard Gobbels, Fred Cook, and William Nettles are supervisors within the meaning of Section 2(11) of the Act. I now turn my attention to Chris Bass.

B. Foreman Chris Bass is a Supervisor within the meaning of Section 2(11) of the Act.

As stated above, an individual need only possess one of the 12 indicia set forth in Section 2(11) of the Act, or the authority to effectively recommend such action. Ohio Power Co. v. NLRB, 176 F.2d 385 (6th Cir. 1949) cert. denied 338 U.S. 899 (1949). The

²³ This is based solely on the testimony of the superintendent.

burden of proving such supervisory status lies with the party asserting that supervisory status exists. Kentucky River Community Care, Inc., 532 U.S. 706 (2001).

Despite the Petitioner's argument to the contrary, the record evidence establishes that, while he has not exercised it, while serving as a foreman, Bass has the authority to hire employees. In fact, Bass has been instructed more than once to find and hire employees. He has also been instructed to hire any day laborers that he thinks will make good employees. Clearly, Bass has been vested with the authority to evaluate potential employees and to hire employees. An individual need only be vested with the authority to engage in one of the 12 indicia set forth in the Act, or to effectively recommend such action, to be a supervisor within the meaning of Act. The individual need not have actually exercised such authority. Pepsi-Cola Company, 327 NLRB 1062 (1999). Thus, the fact that Bass has the authority as a foreman to hire employees is sufficient to conclude that he is a supervisor within the meaning of Section 2(11) of the Act, regardless or whether he has actually hired employees.

The record evidence establishes that, on four separate occasions, Bass, discharged four employees (although he conferred with the superintendent prior to taking action in at least two situations). Even if Bass only recommended discharging the employees, the record evidence shows that the recommendations were effective. Again, this alone is sufficient to conclude that Bass is a supervisor within the meaning of Section 2(11) of the Act.

While it is not clear in the record how often it has occurred, Bass has disciplined employees. Bass may have spoken to the superintendent before issuing discipline, but it appears that he made the actual decision to discipline the employees. Bass also made the decision to call the superintendent based on his assessment that employees should be disciplined. Further, the superintendent has never rejected any of Bass' recommendations that an employee be disciplined. Thus, at the least, the record

evidence establishes that Bass effectively recommends discipline of employees, even if he cannot independently issue discipline.

The record evidence also appears to establish that Bass assigns and responsibly directs the work of employees.²⁴ While it is true that Bass, and all of the Foremen, are given plans or drawings for the project, the Petitioner's argument that Bass and the other Foremen rely solely on the plans to assign and direct work without using independent judgment fails. Rather, the record evidence shows that Bass makes decisions regarding the number of employees assigned to a particular task and where employees will work. Bass even assigned Stevens to work in a particular area of the project based on Bass' assessment of where he needed help the most. Bass instructs employees to correct work deficiencies and explains how he wants the deficiencies corrected. He also instructs his employees on how he wants certain work performed. Thus, it appears that Bass may assign and responsibly direct employees' work.

The evidence shows that Bass has temporarily transferred employees from his crew to the crews of other foremen. Contrary to the Petitioner's assertion, Bass did, in fact, testify that he had been asked by other foremen for help and he testified that if he could spare his crew, he would just give them to the other foreman. Bass specifically said that he did this without seeking permission. Clearly, Bass is making an independent assessment about whether or not he can spare his employees and he is

²⁴ The Petitioner cites Artcraft Displays, Inc., 262 NLRB 1233 (1982) and Electrical Specialists, Inc., 323 NLRB 705 (1997) in support of its argument that Bass and the seven other Foremen do not assign work. In Artcraft Displays, Inc., the employer provided leadmen with plans and instructions and assigned their crews in accordance with the floor plans and instructions. Any problems were reported to the employer or to a supervisor. Thus, it appears that the leadmen in Artcraft Displays, Inc. had no discretion at all. Here, the foremen are given plans, but no instructions and have the authority to make decisions regarding where employees will work and who will perform tasks, as well as how the tasks will be performed. Further, the foremen must address problems and instruct employees to correct deficiencies, rather than just report them to the superintendent. In Electrical Specialties, Inc., the job leaders assigned work in accordance with the general contractors' specifications and assigned employees to tasks based on those specifications. The job leaders appear to have had no authority to decide which employees would perform certain tasks, nor does it appear that they had authority to instruct employees on how to perform tasks or to redo work according to their specifications. Thus, the job leaders authority in Electrical Specialties, Inc. to assign work appears significantly more limited than the authority of the foremen in this case.

independently transferring them to other crews for unspecified periods of time. Thus, the record evidence is sufficient to establish that Bass has authority to, and has, transferred employees.

Bass has the authority to hire employees, to discharge and/or to effectively recommend the discharge of employees, and to transfer employees and apparently has the authority to responsibly direct employees and to assign them work. Thus, I conclude that Bass, when serving as a foreman, is a supervisor within the meaning of Section 2(11) of the Act.

C. Others serving as Foremen are Supervisors within the meaning of the Act.

Supervisory authority cannot be established through conclusionary statements without supporting evidence. Volair Contractors, Inc., 341 NLRB No. 98 (2004) citing Sear, Roebuck & Co., 304 NLRB 193 (1991). However, the purported supervisors need not testify themselves, nor do documents necessarily have to be introduced in order to establish supervisory status. Rather, testimony by the supervisor's superior may be sufficient to establish supervisory status. See Arlington Masonry Supply, Inc., 339 NLRB No. 99 (2003).²⁵ In the present case, in the absence of contradictory evidence, I rely in large part on the testimony of superintendent Leon and CEO Brown regarding the duties of the foremen to conclude that they are supervisors within the meaning of the Act.²⁶ Their testimony is sufficiently specific and detailed and it is more than merely conclusionary. Thus, I have determined that the Employer, for the reasons explained

²⁵ In Arlington Masonry Supply, the Board determined that the maintenance supervisor was a supervisor within the meaning of the Act based on the testimony of the general manager. The general manager testified that he only visited the garage 3 times a week for five minutes a visit and that the maintenance supervisor was responsible for all of the work going in and out. The general manager also testified that, while the maintenance supervisor had never done so, he could recommend suspension or discharge of an employee and that he would "most likely" follow the recommendation. The general manager testified that the maintenance manager assigned work to the mechanic and reserved other duties for himself and that the general manager had no input into the decisions because he was not there to do it.

²⁶ In reaching my conclusion regarding the remaining foremen, I have also relied on testimony by David Wood and documents introduced in evidence by the Employer.

below, has met its burden to show that those serving as foremen are supervisors within the meaning of the Act.

The record evidence, based on the testimony of superintendent Leon and CEO Brown, shows that foremen have the authority set forth in the Employer's foreman's job description. The duties set forth in the job description include the authority to hire and discipline employees. The superintendent is rarely at the jobsite and those functioning as foremen are responsible for their budgets, manpower, training their employees, maintaining contact with the customer, and coordinating schedules with the general contractor. Each person functioning as a foreman has the same authority to transfer and discharge employees as do the foremen who are stipulated to be supervisors.

The record contains specific examples of employees being hired by Ivars Macias and Jeremy Luteran. While Luteran does not currently have a crew working on the project, it appears that Luteran is seeking to hire a helper and that it is intended that he have a crew on this project.²⁷ The record evidence shows that Danny Weller was told that he had the authority to hire and discharge employees. There is also a specific example of Weller issuing discipline to an employee.

While Weller is still in training, it is clear that as a foreman he exercises and/or holds the authority to hire and discharge employees. The fact that he has not yet exercised that authority does not preclude him from being a supervisor within the meaning of Section 2(11) of the Act. See Pepsi-Cola Company, 327 NLRB 1062 (1999). Further, Weller has disciplined employees. Thus, even though Weller is in training, Weller possesses several of the indicia set forth in Section 2(11) of the Act.

Likewise, the record reveals that when Griffin is assigned as a foreman to a project with a crew working under him, he has the authority to hire, discharge, and

²⁷ Luteran's situation is distinguishable from that of Griffin because he is seeking to hire a helper to work on his project, whereas Griffin has apparently been assigned to work on a project without a crew and without the prospect of hiring a crew for that particular project.

transfer employees, and it appears that he responsibly directs those employees and assigns them work. Of course, when Griffin is assigned to projects without a crew, he obviously has no one to supervise and cannot be a supervisor within the meaning of Section 2(11) of the Act.

I conclude that because foremen Howard Absher, Wayne Chambers, William Griffin, Jeremy Luteran, Ivars Macias, Bradford Mosley, Danny Weller, and Stephen Williams, when they are working on projects as foreman, with crews reporting to them, have the authority to hire employees; to discharge employees; and/or to effectively recommend the discharge of employees; to transfer employees; and apparently to assign work to employees and to responsibly direct them, using independent judgement, they are supervisors within the meaning of Section 2(11) of the Act.

I further note, however, that in the construction industry, journeymen level employees sometimes are employed by the same employer in a supervisory position on one job, but in a non-supervisory position on the next. See Volair Contractors, Inc., 341 NLRB No. 98 (2004). Thus my supervisory findings are limited to those who are actually functioning as foremen with crews reporting that to them, and I note it is not clear from the record that all 14 named “foremen” were actually serving as foremen at the time of the hearing.

IV. CONCLUSIONS AND FINDINGS

A. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.

B. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

- C. The Petitioner²⁸ claims to represent certain employees of the Employer.
- D. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and 2(7) of the Act.
- E. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time sprinkler fitters, apprentices, helpers, and lead fitters employed by the Employer out of its Tampa, Ocala, and Orlando, Florida, and Valdosta, Georgia facilities; excluding foremen,²⁹ office clerical employees, designers, estimators, guards and supervisors, as defined in the Act.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Association of Journeymen and Apprentices of the Plumbing, Pipefitting, Sprinkler Fitting Industry of the United States and Canada, Local 821, AFL-CIO. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility.

Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not

²⁸ At the hearing, the Employer refused to stipulate that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act. However, in its Brief, at page 1, the Employer concedes that the Petitioner is in fact a labor organization within the meaning of Section 2(5) of the Act.

²⁹ Foremen who do not have crews assigned to them on either the payroll eligibility date or the date of the election may vote subject to challenge.

work during that period because they were ill, on vacation, or temporarily laid off.³⁰

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or have been discharged for cause since the designated payroll period; (2) employee engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and (3) employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters.

In order to assure that all eligible voters have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision and Direction of Election, two (2) copies of an alphabetized election eligibility list, containing the full names and addresses of all eligible voters in the unit found appropriate, shall be filed by the Employer with the Regional Director for Region 12.³¹ North Macon Health Care Facilities, 315 NLRB 359 (1994). In

³⁰ The parties stipulated that the formula set forth in Daniels Construction Company, 133 NLRB 264 (1961), as modified by Steiny And Company, Inc., 308 NLRB 1323 (1992) should not be used in this case. They noted that the Employer has a stable workforce.

³¹ If the list is submitted by hard copy, two copies should be provided.

order to be timely filed, such list must be received in the Regional Office on or before August 19, 2004.

No extensions of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list.

C. Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three full working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the elections are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the Election Notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the Election Notice.

V. RIGHT TO REQUEST REVIEW.

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W. Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m., EST on August 26, 2004. The request may not be filed by facsimile.

DATED at Tampa, Florida this 12th day of August 2004.

/s/[Rochelle Kentov]
Rochelle Kentov, Regional Director
National Labor Relations Board, Region 12
201 E. Kennedy Boulevard, Suite 530
Tampa, Florida 33602